

Order

Entered: November 7, 2003

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

120157
120185

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v [120157]

WILLIAM C. McGEE,
Defendant-Appellant.

SC: 120157
COA: 215576
Oakland CC: 98-159206-FH,
98-159207-FH, 98-159213-FH, and
98-159214-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v [120185]

WILLIAM C. McGEE,
Defendant-Appellee.

SC: 120185
COA: 215576
Oakland CC: 98-159206-FH,
98-159207-FH, 98-159213-FH, and
98-159214-FH

On order of the Court, leave to appeal having been granted, 467 Mich 915 (2002), and oral argument having been considered, we VACATE the judgment of the Court of Appeals and REMAND this matter to the Oakland Circuit Court for a new trial. The record in this case reveals circumstances from which consent to the circuit court's declaration of a mistrial can be inferred. Therefore, retrial is not barred by the constitutional protection against double jeopardy.

Markman, J., dissents and states as follows:

It is well settled that a defendant can be retried without violating double jeopardy principles where a mistrial has been declared and the defendant either consented to such or it was occasioned by manifest necessity. *People v Lett*, 466 Mich 206, 215 (2002). The majority concludes that defendant consented to the circuit court's declaration of a mistrial and, thus, that defendant can be retried without violating the constitutional protection against double jeopardy. I respectfully dissent. I am unaware of any evidence here that defendant consented to the trial court's declaration of a mistrial. "Mere silence or failure to object to the jury's discharge is not such consent." *People v Johnson*, 396 Mich 424, 432 (1976).

Further, the mistrial declaration was not occasioned by manifest necessity. The mere presence of an alternate juror during deliberations did not make it manifestly necessary to declare a mistrial. See *United States v Olano*, 507 US 725, 737 (1993) (concluding that “[t]he presence of [non-participating] alternate jurors during jury deliberations is not the kind of error that ‘affect[s] substantial rights’”). Because it was not manifestly necessary for the circuit court to declare a mistrial when it did, and because defendant never consented to such a declaration, constitutional principles of double jeopardy prohibit defendant’s retrial. The Court of Appeals erred in relying on circumstances that occurred *after* the trial court declared a mistrial to find manifest necessity. Because the circumstances constituting manifest necessity must exist *at the time* the mistrial is declared, it is *these* circumstances that must compel the mistrial declaration. Accordingly, in my judgment, defendant cannot be retried without violating the constitutional protection against double jeopardy, and thus I would reverse in part the decision of the Court of Appeals.

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I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 7, 2003

Corbin R. Davis
Clerk